IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-363

MICHAEL GRASSO, JR., *Petitioner,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner, Michael Grasso, Jr., respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit, entered on August 2, 1978.

OPINION BELOW

The Judgment Order of the United States Court of Appeals for the Third Circuit, which is unreported, appears in the Appendix hereto. Neither the Court of Appeals nor the United States District Court for the Eastern District of Pennsylvania rendered Opinions in this matter.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on August 2, 1978. Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, the Court of Appeals ordered on August 10, 1978 that issuance of the judgment and mandate be stayed until September 1, 1978. A copy of such Order appears in the Appendix hereto. This Petition for a Writ of Certiorari

was filed within 30 days of August 2, 1978 and on or before September 1, 1978. The jurisdiction of the United States Court of Appeals for the Third Circuit was based upon Title 28 U.S.C., §1291 which authorizes appeals from judgments of sentence entered by District Courts. The jurisdiction of this Court is invoked under Title 28 U.S.C., §1254(1).

QUESTION PRESENTED

Is a Defendant in a federal criminal case entitled at least to a hearing on a motion to dismiss an indictment where the Prosecutor wrote and inserted the charge in the indictment despite the fact that (a) no evidence was presented to the grand jury that defendant was guilty of the offense, (b) such evidence as was presented to the grand jury affirmatively exculpated the defendant, and (c) critical additional exculpatory evidence in the possession of the Government was not presented to the grand jury?

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part that:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . ."

STATEMENT OF THE CASE

Petitioner and three co-defendants were tried originally before the Honorable Joseph S. Lord, III, Chief Judge of the United States District Court for the Eastern District of Pennsylvania, sitting without a jury, upon an indictment charging each defendant with 34 counts of mail fraud in violation of Title 18, U.S.C. §1341 and two counts of racketeering activity in violation of Title 18, U.S.C. §1962. After a lengthy trial, Judge Lord convicted one co-defendant on various counts, acquitted two co-defendants entirely and acquitted Petitioner of 35 of the 36 counts. Petitioner was convicted on Count 18, a mail fraud count, and was the only defendant convicted on that count.

The evidence at the original trial with respect to Count 18 may be summarized briefly, as follows:

Officers of Allegheny Contracting Industries, Inc. (Allegheny) testified that in December, 1974, Petitioner was asked to attempt to obtain for Allegheny surety bonds to assure performance and payment in connection with a construction contract between Allegheny and the Pennsylvania Department of Transportation (PENDOT). (170a) The bonds were obtained from Wisconsin Surety Company and Allegheny paid Petitioner $15,000, of which $6,000 was premium and $9,000, a fee. (822a-824a)

Eric Moss, President of Wisconsin Surety Company testified that PENDOT subsequently rejected one of four reinsurers on the bonds because it was not licensed in Pennsylvania. On January, 10, 1975, Moss mailed a reinsurance form to Grasso for the purpose of having Grasso obtain the needed reinsurance. Although in January, 1975 Grasso resided and had his offices in Miami, Florida, the letter was addressed (Gov. Exh. 19, 826a-29a) as follows:

> Mike Grasso
> MOUNT VERNON AGENCY, INC.
> 3001 North Fulton Drive
> Suite 809
> Atlanta, Georgia 30305

This was not and never was Petitioner's address. (701a-03a; 948a-52a; 1233a-34a) It was this mailing that was alleged in Count 18 to have been for "the purpose of executing the scheme to defraud".

Daniel Culnen testified that in January, 1975, at the office of Petitioner in Miami, Florida, Culnen executed the reinsurance document on behalf of Summit Insurance Company at the request of Petitioner who knew that Culnen had been enjoined preliminarily from executing insurance on Summit. (376a-79a; 850a-51a)

It was stipulated that the reinsurance document executed on behalf of Summit Insurance Company and signed by Daniel Culnen was filed with PENDOT on January 16, 1975. Culnen's signature on this form was dated in his handwriting "May 10, 1974".

It was on this evidence that Judge Lord convicted Petitioner on Count 18 at the first trial. The evidence conformed precisely to a detailed description of the offense contained in the Indictment.

Thereafter, Judge Lord granted Petitioner a new trial on the basis of newly discovered evidence. The retrial was limited to Count 18 because he had acquitted the Petitioner on the 35 other counts at the first trial.

Prior to the commencement of the second trial, Petitioner filed a timely Motion to Dismiss the Indictment for Abuse of Grand Jury Procedures. The motion was based entirely on undisputed evidence introduced in the Government's case at the first trial and disclosed by the Government after the first trial had ended. (950a-52a) The factual bases for the Motion to Dismiss were as follows:

At the first trial Daniel Culnen admitted he had testified only once at the grand jury. (490a-91a) His testimony was that the reinsurance forms had been signed by him in blank on May 10, 1974 and was one of several such forms furnished by Culnen to Wisconsin in 1974. He denied repeatedly that Petitioner ever had requested that

he sign the forms in January, 1975 or at any other time. (475a-89a; 601a-06a)

Mr. Moss had testified before the grand jury only that he "thought" the January 10, 1975 letter transmitting the reinsurance forms were mailed to Petitioner. (951a)

With respect to the manner in which the January 10, 1975 letter was addressed, the Postal Inspector assigned to the case had in his possession three months prior to the Indictment, a memorandum reflecting an investigation by the United States Postal Service which set forth the following in paragraph 4 thereof (948a-49a):

> "4. Mount Vernon Surety Company was placed in receivership by the State Insurance Commissioner in December, 1972. It is understood that the offices at 3001 North Fulton Drive were vacated shortly thereafter. Inquiry of the carrier serving 3001 North Fulton Drive disclosed Mount Vernon Agency, Inc., was not located in Suit 809 at that address in January, 1975 when your letter in question, addressed to Mike Grasso at that address, was mailed. The carrier further advised that no forwarding order was on file for Mount Vernon Agency, Inc., and that he had never heard the name Mike Grasso. Sidney Shine occupies Suit 819 at 3001 North Fulton Drive and may have had some connection with Grasso at that time and in view of his connections with Mount Vernon Surety Company, the letter conceivably could have been delivered to him although the carrier feels to the contrary."

It is conceded that neither the memorandum, nor the information contained therein, was ever brought to the attention of the grand jury of the Prosecutor.

In summary, the only evidence the grand jury heard with respect to Count 18 was the testimony of Culnen that the reinsurance form was executed on May 10, 1974 and that Petitioner was entirely uninvolved. Culnen's testimony

was supported by the May 10, 1974 date which appeared on the form below his signature in his handwriting.

The grand jury also had the testimony of Moss that he "thought" the reinsurance forms were mailed on January 10, 1975. However, the Postal Inspector in this case knew, but never informed the grand jury or the Prosecutor's office until after the Indictment that the Moss letter was sent to a vacant suite in Georgia for which there was no forwarding order on file, and as to which Petitioner had no connection.

In spite of the fact the evidence before the grand jury was wholly exculpatory of Petitioner on this Count, the indictment details a contrary version upon which the Petitioner was tried at the second trial. The origin of this contrary version also is clear. *After* Culnen testified before the grand jury, but *before* the Indictment, Culnen recanted his grand jury testimony in an "off the record" statement to an Assistant United States Attorney in which he stated for the first time that Petitioner had solicited him in Miami to sign the reinsurance forms January, 1975. (608a-09a) The recantation never was presented to the grand jury. Instead, the recantation simply was written into the Indictment by the Assistant United States Attorney.

It was on this record that the District Court denied without a hearing Petitioner's timely motion to dismiss the indictment. Thereafter, Petitioner was found guilty at the second trial and sentenced to a term of 6 months in prison and 4½ years probation.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court Below Conflicts With Decisions In The Second and D.C. Circuits In That It Emasculates The Fifth Amendment Right To Grand Jury Indictment By Approving An Indictment Written By The Government On The Basis of Evidence Never Presented To The Grand Jury And In Disregard Of Exculpatory Evidence Concealed From The Grand Jury.

At the beginning of this decade, there was considerable debate whether the grand jury should be retained or abolished as an anachronism which had become simply an arm of the prosecutor. Compare Younger, *The People's Panel* (1963) with Antell, *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A.J.153 (1965) and Campbell, *Eliminate The Grand Jury*, 64 J.Crim.L.C. 174 (1973).

This debate effectively has been ended by a series of decisions in which this Court has expanded the investigatory powers of federal grand juries virtually to the outermost limits. See, *e.g. United States* v. *Dionisio*, 410 U.S.1, 93 S.Ct. 764; *United States* v. *Calandra*, 414 U.S. 338, 94 S.Ct. 613 (1974); *Branzburg* v. *Hayes*, 408 U.S. 665, 92 S.Ct. 2646 (1973); *United States* v. *Mandujano*, 425 U.S. 564, 96 S.Ct. (1976). In each instance, the rationale for entrusting such powers to grand juries has been the safeguards inherent in the nature of the grand jury as an "independent body of citizens" charged with the duty to stand as a "shield" between the Government and the accused.

While prosecutors have been urging the continued expansion of the investigatory powers of grand juries, they have in practice sought to limit and encroach upon the independence of grand juries in the performance of their "shielding" function. Thus, the rationale for both the in-

vestigatory and shielding functions of grand juries is under continual threat of erosion.

This Court having made the decision to reaffirm and bolster the powers of federal grand juries, it is essential that there be equal reinforcement of the independence and integrity of grand juries against the natural tendency of prosecutors to dominate them. Most Courts of Appeal have recognized this imperative either explicitly or implicitly. However, the Third Circuit stands out as one court which adheres to traditional rules rendering the grand jury little more than a "rubber stamp" of the prosecutor. The leading Third Circuit case in this area is *United States ex rel Almeida* v. *Rundle*, 383 F.2d 421 (1967). In that case, there was concealed from the grand jury evidence that the bullet which killed a police officer was fired by another police officer and not the defendant. Holding that "an indictment returned by a legally constituted nonbiased grand jury, . . . is enough to call for a trial. . . .", and stating that an indictment may be founded on "tainted" evidence, the court brushed aside Almeida's constitutional claims. In the present case, the Government relied on *Almeida* in the Court of Appeals and both the District Court and the Court of Appeals, during oral argument, stated that Third Circuit precedents precluded an inquiry into the constitutional claims presented here.

By contrast, Courts of Appeals in other than the Third Circuit have been sensitive to the need to assure that the grand jury does not become simply the "rubber stamp" many defense attorneys and scholars claim it is. Thus, in *Gaither* v. *United States*, 413 F.2d 1061 (D.C. Cir. 1969), the Court reviewed the indicting procedure followed in the District of Columbia under which the grand jury heard the evidence and then voted to "present" the defendants for a crime. The "Presentment" consisted of a bare statement that the defendant committed a named offense, and was signed by the foreman of the grand jury. Thereafter, an Indictment was drafted by an Assistant United States

Attorney which was signed by the foreman of the grand jury without any further consideration by the jurors themselves.

The Court held that although it was proper for an Assistant United States Attorney to draft a Bill of Indictment, a "true" Bill could be returned only after the Bill of Indictment was considered by the jurors. Judge Wright emphasized that the grand jury was intended to be a "shield" between the Government and its citizens, as follows (413 F.2d at 1066):

> "The Fifth Amendment requires that an indictment be brought by a grand jury. The grand jury is interposed 'to afford a safeguard against oppressive actions of the prosecutor or a court'. The decision to hale a man into a court is a serious one, subject to official abuse. For this reason, 12 ordinary citizens must agree upon an indictment before a defendant is tried on a felony charge. The content of the charge, as well as the decision to charge at all, is entirely up to the grand jury—subject to its popular veto, as it were. The grand jury's decision not to indict at all, or not to charge the facts alleged by the prosecutorial officials, is not subject to review by any other body.
>
> The sweeping powers of the grand jury over the terms of the indictment entail very strict limitations upon the power of prosecutor or court to change the indictment found by the jurors, or to prove at trial facts different from those charged in that indictment. Since the grand jury has unreviewable power to refuse indictment, and to alter a proposed indictment, proof at trial of facts different from those charged cannot generally be justified on the ground that the same facts were before the grand jury and that the jurors might or even should have charged them."

After reviewing the Supreme Court cases condemning amendments and "constructive" amendments of indictments, Judge Wright concluded (413 F.2d at 1071):

> "We conclude then that Rule 6 requires the grand jury as a body to pass on the actual terms of an indictment. We are impelled to this conclusion largely by the constitutional principles of *Bain*, *Stirone* and *Russell*, which emphasize the right of the accused to be tried on an indictment which has in each material particular been approved by a grand jury. Thus, it follows that the bringing of an indictment under the procedure followed in this case was error."

The vice in the *Gaither* case was the circumvention by the Government of the safeguard that a grand jury, and *not the prosecutor*, evaluate the evidence and make the decision whether to charge. Other cases, particularly in the Second Circuit, recently have reaffirmed the determination of the courts to protect the independent and meaningful screening function of the grand jury against usurpation by overzealous prosecutors. Thus, in *United States* v. *Estepa*, 471 F.2d 1132 (2 Cir. 1972), the Court exercised its supervisory powers to prohibit undue reliance upon the presentation of hearsay evidence, and an indictment was dismissed where the prosecutor did not expressly inform the grand jurors that the evidence presented was hearsay. The Court stated (471 F.2d at 1135):

> "We have previously condemned the casual attitude with respect to the presentation of evidence to a grand jury manifested by the decision of the Assistant United States Attorney to rely on testimony of the law enforcement officer who knew least, rather than subject the other officers, or himself, to some minor inconvenience."

The Court then admonished that (471 F.2d at 1136):

> "When the framers of the Bill of Rights directed in the Fifth Amendment that 'No person shall be held to answer for a capital, or other infamous crime, unless on a presentation or indictment of a Grand Jury', they were not engaging in a mere verbal exercise."

See also *United States* v. *Pastor*, 419 F.Supp. 1318 (S. D. N. Y. 1976).

Another line of recent cases seeks to preserve the review function of the grand jury by requiring the prosecution to bring to the attention of the grand jury events subsequent to the testimony of a witness which affect the credibility of such witness. See *United States* v. *Basurto*, 497 F.2d 781, 785-87 (9 Cir. 1974); *United States* v. *Provenzano*, 440 F.Supp. 561 (S. D. N. Y., 1977); *United States* v. *Gallo*, 394 F.Supp. 310 (D. Conn. 1975).

Nor may prosecutors suppress evidence undermining the credibility of witnesses. *Loraine* v. *United States*, 396 F.2d 335 (9 Cir. 1968); *United States* v. *Samango*, 450 F.Supp. 1097 (D. Hawaii 1978). Finally, if the Government knows that a witness before the grand jury has committed perjury, it may not permit the grand jury to indict on such perjured testimony even if there is sufficient other evidence. *United States* v. *Goldman*, 451 F.Supp. 518 (S. D. N. Y. 1978).

These relatively new developments complement the ancient safeguard against indictment by a grand jury on "no evidence". While a reluctance to delay or intervene in the grand jury process precludes the courts from considering the admissibility, competence or sufficiency of the evidence (*United States* v. *Calandra*, 414 U.S. 338 (1974)), no court ever has upheld an indictment based upon "no evidence" of one or more of the essential elements of the offense.

The classic statement of the "no evidence" rule was by Judge Learned Hand in *United States* v. *Costello*, 221 F.2d 668 (2 Cir. 1955). Judge Hand held that an indictment may properly be based on hearsay, but also said (221 F.2d at 677):

> "We should be the first to agree that, if it appeared that no evidence had been offered that rationally established the facts, the indictment ought to be quashed; because then the grand jury would have in substance abdicated."

This Court affirmed the Costello holding that an indictment may not be quashed based on hearsay evidence. *Costello* v. *United States*, 350 U.S. 359 (1956). Although the court did not have occasion to comment on Judge Hand's dictum regarding "no evidence", Mr. Justice Burton, in a concurring Opinion, specifically stated (350 U.S. at 409):

> "I agree with Judge Learned Hand that 'if it appeared that no evidence had been offered that rationally established the facts, the indictment ought to be quashed; because then the grand jury would have in substance abdicted'."

See also *Brady* v. *United States*, 24 F.2d 405 (8 Cir. 1928).

In the present case, virtually everyone of the recent safeguards fashioned in other circuits was violated. First, the charge was based on "no evidence". Second, critical exculpatory evidence in the possession of the Government which discredited the testimony of Moss that he mailed the letter on January 10, 1975, and that Petitioner ever received the letter, was never presented to the grand jury.

Indeed, it is obvious that Count 18 was drafted by an Assistant United States Attorney on the basis of the "off the record" statement given by Daniel Culnen *after he had exculpated* Petitioner before the grand jury. The Government never has denied this fact. Instead, the Government has contended in the courts below that the grand jury somehow "could have inferred" the commission of the entire offense solely from the testimony of Moss that he "thought" he mailed the reinsurance forms on January 10, 1975.

There are three obvious answers to the Government's position. First and most importantly, any inference from this fact alone that Petitioner solicited Culnen to fraudulently execute the form is utterly impossible and patently absurd. Second, the Government ignores the fact that it concealed from the grand jury evidence that the Moss mailing was misaddressed to a vacant suite with which Petitioner had no connection. Having concealed information from the grand jury which bears directly on whether the forms in fact were mailed on January 10, 1975, or received by Petitioner in January, 1975, the Government cannot be heard to contend that Count 18 could have been constructed by the grand jury solely from the fact that the mailing did occur in January, 1975. Finally, the Government *knows* what really happened. The fact that the Assistant United States Attorney drafted the Indictment on the basis of the recantation statement has been alleged repeatedly, without contradiction, and is obviously true. *Thus, the Government has a duty to Petitioner and to this Court to admit the truth and not urge this Court to infer falsely that the grand jury somehow constructed Count 18 from Mr. Moss's testimony alone.*

The role of the grand jury as a "shield" between the Government and its citizens is mandated in federal criminal procedure by the Fifth Amendment to the Constitution. When critics call the grand jury a "rubber stamp", its staunchest defenders as an "independent body of citizens" are federal prosecutors who value its potent investigating powers and cloak of secrecy. The other side of the coin must be that prosecutors cannot bypass this "independent body of citizens" where its function is to protect citizens against false or flimsy accusations. It is submitted that this case presents a perfect vehicle by which this Court might mandate that all of the Circuits join those Circuits in which the integrity of the institution of the grand jury is being reaffirmed and strengthened against those who would make it truly a rubber stamp.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit on the question presented herein.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1037

UNITED STATES OF AMERICA

v.

MICHAEL GRASSO, JR., *Appellant*

On Appeal from the United States District Court for the Eastern District of Pennsylvania, Crim. No. 76-505-1.

Argued July 25, 1978

Before: ADAMS, WEIS and HIGGINBOTHAM, *Circuit Judges.*

JUDGMENT ORDER

After consideration of the contentions raised by appellant, namely, that the judgment of the district court should be reversed because (1) the evidence adduced at trial was fatally at variance with the indictment and constituted an impermissible "constructive amendment" of the indictment; (2) the grand jury procedures were abused, and thus the indictment should be dismissed; and (3) the evidence was insufficient to establish the requisite elements of the offense of mail fraud as contained in 18 U.S.C. §1341, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

/s/
Circuit Judge

ATTEST:

/s/
Acting Clerk

Dated: August 2, 1978

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1037

UNITED STATES OF AMERICA

v.

MICHAEL GRASSO, JR., *Appellant*

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until September 1, 1978.

/s/
Circuit Judge

Dated: August 10, 1978